No. 87-1886

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HYMAN GREENBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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JED S. RAKOFF
BRIAN T. FITZPATRICK
RALPH P. DESANTO
MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, N.Y. 10038
(212) 510-7000
Counsel for Petitioner
Hyman Greenberg

30pw

QUESTIONS PRESENTED

1. Should the determination of the materiality of false claims and statements under 18 U.S.C. §§ 287 and 1001 be made by the jury instead of by the district judge? (The Courts of Appeals are divided on this question.)

2. Is such materiality a required element of these statutes? (Again, the Courts of Appeals are divided on this question.)

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Petitioner Hyman Greenberg respectfully requests that writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Fourth Circuit, embodied in an opinion filed March 8, 1988. The lower court's decision affirmed Mr. Greenberg's conviction of one count of conspiring, in violation of 18 U.S.C. § 371, to submit a false claim to the Government, 18 U.S.C. § 287, and to make false statements to the Government, 18 U.S.C. § 1001, and one count of aiding the submission of a false claim to the Government, in violation of 18 U.S.C. §§ 287 and 2. Although acquitted of the remaining eight counts of the indictment, petitioner was sentenced to 18 months' imprisonment, which he is presently serving.

OPINION BELOW

The unpublished opinion of the Court of Appeals is reprinted in the Appendix to this petition, *infra*, at 1a–9a.[1]

JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 18, United States Code:

§ 2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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1. Citations to the Appendix to this petition are denoted by a lower-case "a" following the page number ("____a").

§ 287. False, fictitious or fraudulent claims.

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

§ 1001. Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

This case presents the Court with the opportunity to resolve two significant questions on which the Circuit Courts are divided, arising under two of the most frequently used federal criminal statutes: the false claims statute (18 U.S.C. § 287) and the false statements statute (18 U.S.C. § 1001). One question is whether "materiality" is an element of these crimes, *i.e.*, whether violation of these statutes requires that the false claims and statements be *materially* false. Not only are the Circuits divided on this question, but several Circuit Courts have resolved the issue one way with respect to § 1001 and a different way with respect to § 287, even though both sections were enacted as a single statute. The other question is whether the determination of such materiality (under § 287, § 1001, or both) is properly left to the jury or can be resolved

by the district court as a matter of law. Again, the Courts of Appeals are divided on this question, and at least one Justice of this Court is already on record as favoring the prompt resolution of this issue. *See Greber v. United States*, 106 S. Ct. 396 (1985) (Justice White dissenting from denial of certiorari).

The facts of the instant case are generally set forth in the opinion of the Court of Appeals, *United States v. Greenberg*, No. 87–5089, at 2a–5a. In essence, Atlantic Hardware, a small New York tool supplier of which petitioner Greenberg was president, contracted to supply the General Services Administration ("GSA") with a small quantity of tool kits containing, *inter alia*, a John Fluke Mfg. Co. multimeter "or equal."[2] Prior to shipment, Atlantic obtained the approval of a Government inspector to substitute a cheaper Sperry Co. multimeter for the Fluke multimeter without further reducing the price of the kits. Atlantic then shipped to GSA sixty such kits containing the Sperry meter, which GSA retained. Although Atlantic was subsequently informed that the inspector's approval was unauthorized, it billed GSA for the full contract price of the 60 kits, *i.e.*, $30,120 or $502 per kit. This bill constitutes the "false claim" that provided the basis for the § 287 prong of the two–prong conspiracy count (Count 1), of which petitioner was convicted, as well as the basis for the § 287 substantive count (Count 2), of which he was also convicted.[3]

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2. A multimeter measures electrical currents.

3. A subsequent attempt by Atlantic to obtain approval of the Sperry substitution through a "deviation request" was also rejected by GSA. Although the opinion of the Court of Appeals refers to a forged invoice prepared by a co–conspirator in connection with the deviation request, the invoice formed no part of the substantive charges against petitioner and the district court so instructed the jury. (Trial transcript at 714–15).

Additionally, in connection with the inspection of some of the other items in the tool kit, Atlantic, which had experienced difficulty in getting tool manufacturers to supply executed copies of standardized test reports on their tools, provided the Government inspector with some falsely-executed reports. These reports constitute the "false statements" that provided the basis for the other, § 1001 prong of the conspiracy count of which petitioner was convicted, as well as the basis for the remaining eight substantive counts (Counts 3–10) of which he was acquitted.

At trial, petitioner Greenberg expressly contested the materiality both of the false claim he was convicted of helping to submit and of the false statements he was convicted of conspiring to make. Among much else, Greenberg adduced evidence that by the time GSA received Atlantic's bill (the "false claim"), Atlantic had already informed GSA that Atlantic had supplied a cheaper multimeter than the Fluke, so that the bill could not have had any tendency to mislead GSA into believing that the bill was for tool kits that included the Fluke. Likewise, Greenberg adduced evidence that it was understood by both Atlantic and GSA that the Government inspector, who was an acknowledged expert on testing tools, would rely on his on-site testing of the tools, rather than on the test reports (the "false statements"), which were not required by the original contract and which the inspector may not have even examined before returning them to Atlantic, which retained them.

The Government, for its part, contested the inferences of immateriality arising from this and other such evidence, and introduced competing evidence of its own. But even though the resolution of this contest over materiality rested entirely on factual determinations, the jury was never asked to make such determinations, despite the repeated requests of petitioner that they be directed to do so. This was because the district court, following what it took to be accepted Fourth Circuit law, held that the determination of materiality under both § 287 and

§ 1001 was for the court, and proceeded to make that determination adversely to petitioner. Likewise, on appeal, the panel of the Fourth Circuit reaffirmed that the determination of materiality under § 1001 was for the judge, and further held that, if materiality was even an element of § 287 (which it questioned), it too was to be decided by the judge and not the jury. *United States v. Greenberg*, No. 87–5089, at 8a. In so ruling, the Court of Appeals misread these statutes and deprived petitioner of his constitutionally–guaranteed right to a jury determination of every essential element of the offenses charged against him.

ARGUMENT

I.

The Elements of Materiality Under 18 U.S.C. §§ 287 and 1001 Should Have Been Decided By The Jury

In the instant context, as in so many others, a false claim or statement is material if it can be expected to influence the person to whom it is directed in making the decision to which it pertains.[4] On its face, this is predominantly a factual determination, and in many contexts it is plainly recognized as such. For example, if a vendor of securities makes a false statement to his purchaser, it is for the jury to determine whether the statement could have reasonably influenced the decision to purchase and therefore be material, and actionable, under the securities laws. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976).

There is no logical reason why any of this should be treated differently when the vendor is, as here, selling tool kits instead of securities and the buyer is GSA instead of a private person or company. And yet many Circuit Courts have held otherwise. Specifically, in false statement cases under § 1001, most circuits (including the Fourth Circuit, as here) have held that, while materiality is an essential element of the offense, its determination is for the district judge.[5] Likewise, while far

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4. *See, e.g., United States v. Snider*, 502 F.2d 645, 652 (4th Cir. 1974); *Weinstock v. United States*, 231 F.2d 699, 701–02 (D.C. Cir. 1956).

5. *Weinstock v. United States*, 231 F.2d at 703; *United States v. Greber*, 760 F.2d 68, 73 (3d Cir.), *cert. denied*, 106 S. Ct. 396 (1985); *United States v. Ivey*, 322 F.2d 523, 529 (4th Cir.), *cert. denied*, 375 U.S.

fewer circuits have expressly addressed the question in cases brought under § 287, most of those which have addressed it have again concluded that materiality under § 287 is to be determined by the court.[6]

Yet at least two Circuit Courts have rejected this anomaly in the law, *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979), *cert. denied*, 455 U.S. 1016 (1982); *United States v. Irwin*, 654 F.2d 671, 677 (10th Cir. 1981), and two others appear to have questioned it, *United States v. Johnson*, 718 F.2d 1317, 1324 (5th Cir. 1983) (*en banc*); *United States v. Adler*, 623 F.2d 1287, 1292 n.8 (8th Cir. 1980).[7] As several of these decisions point out, the majority rule appears to be rooted neither in logic nor policy but to derive, instead, from an over–extension of a stray paragraph in *Sinclair v. United States*, 279 U.S. 263, 299 (1929), in which the determination of the "pertinency" of perjury (under a now–defunct statute substantially different from § 287 and § 1001) was held to be similar to a determination of "relevancy" and therefore for the judge.

As the Fifth Circuit has noted, the logic of this statement in *Sinclair*, even if confined to its original context, "is not immediately obvious," for a relevancy ruling merely determines whether a sufficient preliminary threshold has been

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953 (1963); *United States v. Haynie*, 568 F.2d 1091, 1092 (5th Cir. 1978); *United States v. Chandler*, 752 F.2d 1148, 1150 (6th Cir. 1985); *United States v. Brantley*, 786 F.2d 1322, 1327 (7th Cir.), *cert. denied*, 106 S. Ct. 3284 (1986); *United States v. Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983); *United States v. Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984).

6. *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir. 1984), *cert. denied*, 469 U.S. 822 (1984); *United States v. Haynie*, 568 F.2d at 1092.

7. *See also United States v. Brantley*, 786 F.2d at 1327, suggesting that the Seventh Circuit follows the majority approach only because it feels bound by the *Sinclair* case, discussed *infra*.

met to enable the questioned evidence to be heard by the jury, whereas the ruling on materiality is a final determination of an essential element on which guilt or innocence depends. *See United States v. Johnson*, 718 F.2d at 1324. Moreover, as Judge McMillian of the Eighth Circuit has noted, the distinction makes even less sense outside the specific context of *Sinclair*:

> [There,] [t]he issue was whether the testimony was 'material' to the committee's inquiry. That question was akin to the relevancy of evidence in a legal proceeding, a matter specifically in the competence of the judge. [Here,] [t]he question of materiality in a fraud–type case like this proceeding is the factual tendency of the alleged fraud to induce action by the government, a question quite different than the relevancy of evidence in a legal proceeding.

United States v. Adler, 623 F.2d at 1292 n.8.

That *Sinclair* is illogical is bad enough, and that it has been misapplied out–of–context is worse. But the greatest harm is that the result has been to deprive a criminal defendant of his constitutionally–guaranteed right to have a jury determine every element of the offenses charged against him. *See In re Winship*, 397 U.S. 358, 364 (1970). Moreover, determination of the element of materiality under § 287 and § 1001 is very largely a matter of determining facts, which is exclusively the province of the jury. As this Court stated long ago, it is fundamental to due process that:

> it [is] the duty of the court to expound the law and that of the jury to apply the law as thus declared to the facts as ascertained by them. In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without endangering

> the stability of public justice, as well as the security of private and personal rights.

Sparf v. United States, 156 U.S. 343, 363 (1895).

Under these circumstances, it is imperative that this Court intervene to resolve not only a split among the Circuits but also a seemingly patent derogation of petitioner's right to trial by jury.

II.

Materiality Is A Required Element Of 18 U.S.C. § 287 and 18 U.S.C. § 1001

In affirming petitioner's conviction, the Court of Appeals not only held that any element of materiality under §§ 287 and 1001 is to be determined by the judge instead of the jury, but also suggested that a showing of materiality may not even be required under § 287. Obviously if the Government is not required to prove materiality under § 287, or, as two other Circuits have suggested, under § 1001, the failure to submit the question of materiality to the jury is harmless. Accordingly, if the Court grants certiorari in this case, it will be obliged to determine whether materiality is an element of § 287 and/or § 1001.

Here, again, there is a split in the Circuits (although several Circuits have not yet addressed the issue). The Fifth and the Tenth Circuits have held that materiality is not an element of § 287, even though it is an element of § 1001.[8] The Eighth Circuit and, prior to the panel's decision in this case, seemingly the Fourth Circuit had held that materiality is an

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8. *See United States v. Haynie*, 568 F.2d at 1092; *United States v. Irwin*, 654 F.2d at 682.

element of both § 287 and § 1001, albeit not one that need be submitted to the jury.[9] And to compound the confusion, the Second Circuit has held that materiality is not an element of either § 287 or § 1001.[10] When confronted with an issue as significant as the existence *vel non* of a required element of a criminal offense, this Court cannot permit such chaos to persist.

The confusion should be resolved by declaring that materiality is an essential element of both § 287 and § 1001. As the Ninth Circuit has stated:

> The evolution of the federal law of fraud and false pretenses has been toward a requirement of materiality. *Cf. United States v. Valdez*, 594 F.2d 725 (9th Cir. 1979); *United States v. Talkington*, 589 F.2d 415 (9th Cir. 1978) (materiality required for convictions for false statements made to federal officers under 18 U.S.C. § 1001); *United States v. Kostoff*, 585 F.2d 378 (9th Cir. 1978) (materiality required for conviction for statements made in furtherance of bank credit fraud under 18 U.S.C. § 1014); 26 U.S.C. § 7206(1) (materiality required for conviction for false

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9. *United States v. Adler*, 623 F.2d at 1291 n.5; *United States v. Snider*, 502 F.2d at 652 n.12.

10. *United States v. Elkin*, 731 F.2d at 1009–10. The even more idiosyncratic position of the Sixth Circuit is that, while materiality is not an "element" of § 1001 in the sense of being part of the proscribed misconduct (and therefore subject to determination by the jury), it is a judicially-imposed "requirement" for purposes of judicial economy (and therefore subject to determination by the court). *United States v. Abadi*, 706 F.2d 178, 180 n.2 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983). One can only wonder how the Sixth Circuit squares this analysis with the fact that one of the crimes proscribed by § 1001 is defined by the statute itself in terms of falsifying "a material fact."

> statements made on tax return); 18 U.S.C. § 1621(1) (materiality required for conviction for perjury); 18 U.S.C. § 1623 (materiality required for conviction for false statements made to grand jury); 18 U.S.C. § 922(a)(6) (materiality required for conviction for false statements made in connection with a firearms purchase).

United States v. Halbert, 640 F.2d 1000, 1007–8 (9th Cir. 1981).

This is true even when the materiality element has been implied rather than expressed in the language of the statute. *See, e.g., United States v. Halbert*, 640 F.2d at 1008 (mail fraud, 18 U.S.C. § 1341); *United States v. Scott*, 701 F.2d 1340, 1344–45 (11th Cir. 1983) (false statements to banks, 18 U.S.C. § 1014); *United States v. Margala*, 662 F.2d 622, 625–27 (9th Cir. 1982) (securities fraud, 15 U.S.C. § 78j(b)).

Sections 287 and 1001 deal with just these kinds of offenses — indeed, they are commonly linked, as here, in prosecutions for fraud–on–the–Government — so that it seems illogical that materiality should not be an element of both, rather than, as in the instant case, of one but not of the other. Indeed, § 1001 by itself proscribes several kinds of deception, only one of which is expressly defined in terms of materiality (to wit, the falsification or concealment of "a material fact"); but most Courts of Appeals have nonetheless held that materiality is an element of every violation embraced by § 1001.[11]

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11. *E.g., Weinstock v. United States*, 231 F.2d at 701; *United States v. Greber*, 760 F.2d at 73; *United States v. Snider*, 502 F.2d at 652; *United States v. Beer*, 518 F.2d 168, 172 (5th Cir. 1975); *United States v. Brantley*, 786 F.2d at 1326; *United States v. Adler*, 623 F.2d at 1291; *United States v. Valdez*, 594 F.2d at 728; *United States v. Irwin*, 654 F.2d at 677 n.8;

The reason, of course, is that the very purpose of § 1001, in all its clauses, is to deter those who would cheat or mislead the Government into taking action it might otherwise not take: the very definition of materiality.[12]

This applies with, if anything, greater force to § 287, which on its face is directed at such cheating. Indeed, as this Court has noted, § 287 and § 1001 were originally enacted as parts of the same statute, "passed almost 100 years ago in the wake of a spate of frauds upon the Government."[13] In enacting this legislation, it was no part of Congress' purpose to criminalize false statements or claims having no tendency to cheat the Government, *i.e.* immaterial claims. Consequently, it makes no more sense to exclude a materiality requirement from § 287 than from those provisions of § 1001 where it has now been implied.

In short, both the history and purpose of sections 287 and 1001 strongly support the requirement of materiality as an element of any offense charged thereunder.

United States v. Lopez, 728 F.2d 1359, 1362 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984).

12. *See United States v. Snider*, 502 F.2d at 652 n.12; *United States v. Johnson*, 284 F. Supp. 273, 278 (W.D. Mo. 1968).

13. *United States v. Bramblett*, 348 U.S. 503, 504 (1955).

CONCLUSION

For the foregoing reasons, petitioner Greenberg respectfully prays that the Court issue writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit.

Dated: May 6, 1988

Respectfully submitted,

Jed S. Rakoff
Brian T. FitzPatrick
Ralph P. DeSanto
Mudge Rose Guthrie
Alexander & Ferdon
180 Maiden Lane
New York, N.Y. 10038
(212) 510–7000

Counsel for Petitioner
Hyman Greenberg

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-5089

United States of America,

Plaintiff-Appellee,

versus

Hyman Greenberg,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge. (CR-87-65-A)

Argued January 7, 1988. Decided March 8, 1988

Before PHILLIPS and MURNAGHAN, Circuit Judges, and YOUNG, United States District Judge for the District of Maryland, sitting by designation.

Jed S. Rakoff (Brian T. Fitzpatrick; Ralph P. DeSanto; Mudge Rose, Guthrie, Alexander & Ferdon; Charles O. Cake; Cake, Rhoades & Rideout, P.C. on brief) for Appellant; Lawrence Joseph Leiser, Assistant United States Attorney (Henry E. Hudson, United States Attorney; Constance Frogale, Assistant United States Attorney; Sarah Moody, Third Year Law Student on brief) for Appellee.

PHILLIPS, Circuit Judge:

Hyman Greenberg was convicted by a jury of conspiring to submit a false claim to the government, 18 U.S.C. § 287, and to make false statements to the government, 18 U.S.C. § 1001, in violation of 18 U.S.C. § 371. Greenberg was also convicted of aiding the submission of a false claim to the government, in violation of 18 U.S.C. § 287 and § 2. Greenberg was acquitted on eight counts of submitting false statements to the government in violation of 18 U.S.C. § 1001 and § 2.

Greenberg raises numerous issues on appeal, principally that the evidence was insufficient properly to establish venue for the prosecution in the Eastern District of Virginia; that the court's jury charge on the scienter requirement of § 287 and § 1001 was improper; that the prosecution improperly vouched for the credibility of its witnesses; that the prosecution violated its disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963); that the trial judge decided an issue that should have been submitted to the jury; and that there was insufficient evidence to convict him. We believe that these and Greenberg's other contentions are without merit and therefore affirm.

I

The charges arose out of a scheme involving a bid by Atlantic Hardware (Atlantic) on a contract to supply the government with medical tool kits. Atlantic is a New York hardware supply company and Greenberg was its president at all times relevant to this case. Atlantic's business included some government contract work, a part of the business run primarily by Bernard Bosch and Bruno Holst.

In the summer of 1984, the General Services Administration (GSA), Federal Supply Service Center (FSSC), issued a solicitation for bids to supply the government with a medical took kit. The solicitation called for the kit to include a number of items, including a John Fluke Mfg. Co. #8020B multimeter "or equal." An FSSC solicitation is actually a multipurpose document. It serves first as the government's solicitation for bids. After a company fills in the prices for the items and submits it back to the government, the document serves as a company's bid. Finally, if the bid is accepted, the document serves as the contract between the government and the successful bidder. Once a bid is awarded, a GSA inspector must approve a preproduction sample of the contract item, a process that typically requires the inspector to review test reports from the manufacturer of the various components. If approval is received, the contract items are shipped, claims for payment submitted, and paid.

In July 1984, Bosch convinced Greenberg that Atlantic should bid on the medical kit contract. Atlantic submitted a bid of $609, that included a price of $152.32 for the John Fluke multimeter. Just before bids were due, Bosch notified Greenberg that he had found a substitute multimeter that was an "equal" of the Fluke multimeter. This new Triplett multimeter cost only $63.30, which allowed Atlantic to lower its bid to $502. While Atlantic submitted its new lower bid in time, it did not notify GSA that the new bid did not include the John Fluke multimeter. Nor did it submit the extensive documentation necessary to support the designation of an "equal," allegedly due to the last-minute nature of the change.

The government accepted Atlantic's bid of $502. As Atlantic began to order the kit items, it learned that the Triplett could not properly qualify as an "equal" to the John Fluke multimeter. Bosch then located a third multimeter, this time a Sperry. Though it was alleged to be an equal, the

Sperry multimeter did not have all the same features of the Fluke and, at $56.50, cost even less than the Triplett. Again, Atlantic never notified the government of either the Triplett or Sperry switch.

In late 1984, a GSA inspector visited Atlantic to inspect the preproduction samples of the tool kit. Though the exact details are somewhat unclear, Bosch apparently got the inspector to approve the Sperry multimeter as an "equal" to the Fluke. With the approval in hand, Atlantic set out to fill the contract order.

The scheme, however, began to unravel. W.S. Jenks & Sons had the rights to distribute the Fluke multimeter and was expecting an order from Atlantic as a result of its successful bid. When no order was forthcoming, Jenks contacted the inspector's superior, Carol McClaugherty, who in turn contacted Bosch. Bosch explained that the inspector had approved the Sperry as an "equal." McClaugherty informed Bosch that an inspector had no such authority and that a formal deviation request would have to be filed. One reason for this process was to allow the government to realize some or all of the difference in price when a cheaper "equal" was substituted for a contract item.

Bosch raised the issue with Greenberg, and suggested offering the government a rebate of $40, about half the difference between the price of the Fluke and the Triplett. Greenberg instead suggested a rebate of $6.50. Bosch then set out to document a price on the Sperry multimeter of $132.50 to bring it within $6.50 of a new price quote on the Fluke. Bosch forged invoices from City Electric Company in New York and had an employee there quote a price of $132.50 on the Sperry when GSA officials called to check.

On March 2, 1985, Atlantic sent 60 tool kits with Sperry multimeters to GSA for final approval and a short

time later submitted its bill for these kits to GSA's office in Kansas City. GSA rejected Atlantic's deviation request, and the matter was referred to federal prosecutors. Bosch and Holst, among others, were charged for their misdeeds. They entered into a plea agreement whereby they pled guilty but were not imprisoned. Bosch and Holst provided the bulk of the testimony implicating Greenberg.

Greenberg was charged in a ten-count indictment. Count I charged him with conspiring to submit a false claim to the government and to make false statements to the government. The former involved Atlantic's seeking payment for the tool kits with Sperry multimeters which should have contained Fluke multimeters. The latter involved his alleged involvement in the submission of false test reports to the GSA inspector. Count II charged Greenberg with submitting the false claim. Counts III through X charged Greenberg with making false statements to the government, with each count representing a different test report.

Following his conviction on the counts indicated, Greenberg took this appeal.

II

A

The following facts are sufficient to establish venue in the Eastern District of Virginia: (1) the contract bid was reviewed, and the contract awarded, by the General Services Administration, FSSC in Arlington, Virginia; (2) through the submission of false test reports to a GSA inspector, Atlantic caused FSSC to issue a "Notice of Inspection," which was necessary for production on the contract to continue; (3) Atlantic shipped 60 tool kits and a Certificate of Compliance to GSA in Franconia, Virginia; and (4) the tool kits and the Certificate of Compliance had to be

approved before GSA would provide the necessary authorization for payment on Atlantic's claim.

B

Greenberg next argues that the district court's jury charge allowed the jury to convict him on less than a finding of "actual knowledge," which is the required scienter element. The district court instructed the jury that:

> Knowledge of a falsehood which has been referred to both in Counts 3 through 10 and in Count 2 may be inferred — is an essential element of the government's proof where that is the subject of your injury. And actual knowledge must be proved. Knowledge of falsehood may be inferred from proof that the defendant deliberately closed his eyes to what would otherwise have been obvious to him or where the defendant's conduct comprises a reckless disregard for the truth with the conscious purpose to avoid hearing the truth. Whether to draw such an inference is entirely up to you, and that you may draw the inference does not relieve the government from proving actual knowledge by proof beyond a reasonable doubt.

Other courts have approved a virtually identical charge in the context of both a § 287 prosecution, *United States v. Cook*, 586 F.2d 572 (5th Cir. 1978), and a § 1001 prosecution, *United States v. Evans*, 559 F.2d 244 (5th Cir. 1977). And we approved of a similar charge in a travel fraud prosecution that required specific intent. *United States v. Biggs*, 761 F.2d 184 (4th Cir. 1985). We believe that the charge here was adequate.

C

Greenberg also alleges instances of prosecutorial misconduct, including improper prosecutorial vouching for witnesses and withholding of information from the defense.

A prosecutor may not normally vouch for the credibility of its witnesses. *United States v. Moore*, 710 F.2d 157, 159 (4th Cir. 1983). As we read them, only one of the challenged comments by the prosecution seriously approaches the line of permissible comment. Even accepting that the comments were improper, however, we do not believe that reversal is warranted. Considering the record as a whole, and in light of the court's curative instructions,[1] we cannot say that Greenberg was prejudiced by the alleged misconduct. *See Moore.*

The prosecution violates its *Brady* obligation where it fails to disclose material, exculpatory or favorable evidence to the defense. Evidence is considered material, as to warrant reversal of a conviction, only if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the case would have been different. *United States v. Bagley*, 473 U.S. 667 (1985). Even if the information identified by Greenberg falls within the government's general *Brady* obligation in the sense that it was favorable or exclupatory, we do not believe that it meets this stringent test of materiality.

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1 The court instructed the jury that counsel's arguments were not evidence, that the jury was to consider only the evidence, and that the jury was the sole judge of witness credibility.

D

Greenberg next contends that the question of the "materiality" of the submissions in issue, as an element of both § 287[2] and § 1001, should have been decided by the jury. As Greenberg concedes, however, the law in this circuit is to the contrary. The question of materiality is one of law and is to be decided by the trial court. *Nilson Van & Storage Co. v. Marsh*, 755 F.2d 362 (4th Cir. 1985). The district court decided it against Greenberg. We find no error in its legal conclusion.

E

Finally, Greenberg contends that there was insufficient evidence to convict him. Essentially, he challenges the credibility of the government's witnesses, particularly that of Bosch and Holst. But the scope of our review when faced with a challenge to the sufficiency of the evidence does not encompass weighing witness credibility. We ask only whether there is substantial evidence, assessing it in the light most favorable to the prosecution, to support the jury's finding of guilt. *Glasser v. United States*, 315 U.S. 60 (1942). Guided by this standard, we believe there is sufficient evidence to support the jury's verdict in this case.

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2 We do not here decide whether materiality is an element of § 287 and note that some courts have recently concluded that it is not. *United States v. Elkin*, 731 F.2d 1005 (2d Cir. 1984); *United States v. Irwin*, 654 F.2d 671 (10th Cir. 1981). While Greenberg cites our decision in *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974), that case did not deal with § 287 and only noted that other courts had read § 287 to contain a materiality requirement. *Id.* at 652 n.12. Even if materiality is an element of § 287, the issue would also be one for the trial judge to decide as a question of law. *United States v. Haynie*, 568 F.2d 1091 (5th Cir. 1978).

Greenberg's defense largely centered around his challenge to the evidence of his knowledge of and involvement in the scheme. Greenberg rightly points out that much of the government's proof is circumstantial. There was evidence that Greenberg was an active, hands–on manager believed by his employees to know what was going on in his company. There was also evidence that Greenberg was not as ignorant as he claimed to be about the various procedures and requirements related to government contract work. More critically, however, is the testimony of Bosch. Bosch testified that Greenberg knew about the scheme from its inception, including the falsifying of the City Electric invoices. And when Greenberg's counsel suggested that Greenberg's conduct was consistent with his claimed ignorance of the scheme, Bosch flatly rejected this and reaffirmed his claim that Greenberg knew. Greenberg urges the unreliability of this critical testimony because of Bosch's interest as a cooperating plea bargainer, and because of its inconsistencies with other testimony given by Bosch. Bosch's credibility was properly challenged by vigorous cross–examination and nevertheless was accepted by the jury, whose function it was to assess its probative value. It clearly sufficed, if believed, to support the verdict on this critical element. Our review does not extend beyond that determination.

AFFIRMED.

No. 87-1886

In the Supreme Court of the United States

OCTOBER TERM, 1987

HYMAN GREENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

12pp

QUESTIONS PRESENTED

1. Whether the materiality of false statements and false claims under 18 U.S.C. (& Supp. IV) 287 and 1001 is a question to be decided by the court rather than by the jury.

2. Whether materiality is an element of offenses under 18 U.S.C. (& Supp. IV) 287 and 1001.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 842 F.2d 1293 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1988. The petition for a writ of certiorari was filed on May 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiring to submit a false claim to the government and to make false statements to the government, in violation of 18 U.S.C. (& Supp. IV) 287, 371, and 1001.[1] He

[1] Petitioner was acquitted on eight counts of aiding and abetting the submission of false statements to the government, in violation of 18

was sentenced to 18 months' imprisonment. The court of appeals affirmed (Pet. App. 1a-9a).

1. The evidence at trial showed that petitioner, along with co-defendants Bernard Bosch, Bruno Holst, and Atlantic Hardware and Supply Company (Atlantic), conspired to furnish a false claim and false information to the government in an attempt to secure payment on a contract from whose terms petitioner and his company had deviated without the approval of the government. Petitioner was the president of Atlantic. Co-defendants Bosch and Holst ran the company's government contract business.

In the summer of 1984, the Federal Supply Service Center (FSSC) of the General Services Administration (GSA) solicited bids for the supply of medical tool kits to the government. The bid request specified that each kit was to contain, among other things, a particular multimeter made by the John Fluke Mfg. Co. or the equivalent of that multimeter. Atlantic initially submitted a bid of $609 for the medical tool kit contract, a price that included $152.32 for the Fluke multimeter. Atlantic subsequently lowered its bid to $502, after co-defendant Bosch informed petitioner that he had found a different but allegedly equivalent multimeter that cost only $63. Atlantic, however, did not inform the FSSC that the bid contemplated furnishing a different multimeter, and the bid did not contain documentation showing that the multimeter was "equal to" the Fluke multimeter. Pet. App. 3a.

The FSSC accepted Atlantic's $502 bid. When the company began to order the various items for the kit, it learned

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U.S.C. 1001. Co-defendants Bernard Bosch, Bruno Holst, Eric Wallace Gingold, and Atlantic Hardware and Supply Corporation pleaded guilty.

that the multimeter in its bid was not in fact equivalent to the Fluke multimeter. Bosch then located a third multimeter, this one manufactured by Sperry. The Sperry device, however, did not have all the features of the Fluke multimeter, and it cost less than the version that was included in Atlantic's bid. Although the bid specifications became part of the contract between the government and Atlantic, neither petitioner nor anyone else at Atlantic informed the FSSC of the change or of the fact that the Sperry multimeter did not conform to the specifications in the FSSC bid request. Pet. App. 3a-4a.

In late 1984, when a GSA inspector visited Atlantic to inspect preproduction samples of the tool kit, Bosch persuaded the inspector that the Sperry multimeter was equivalent to the Fluke version called for by the FSSC. The distributor of the Fluke multimeter subsequently advised the inspector's superior that Atlantic had not ordered any Fluke multimeters. As a result, the GSA supervisor told Bosch that Atlantic would have to submit a formal request for deviation from the terms of the solicitation. Bosch thereupon suggested to petitioner that Atlantic offer the government a $40 rebate, but petitioner told Bosch to submit only a $6.50 rebate. Accordingly, with petitioner's knowledge, Bosch forged invoices from another company to inflate the price of the Sperry multimeter to $132.50, more than twice its true value (but within $6.50 of a recent price quote on the Fluke product). Pet. App. 4a, 9a.

In March 1985, Atlantic sent 60 tool kits containing Sperry multimeters to the GSA for final approval. A short time later, the company submitted a bill for payment on the kits. GSA rejected Atlantic's request for a deviation from the contract and referred the matter for prosecution. Pet. App. 4a-5a.

The charges against petitioner rested on the submission of the claim for payment and the submission of false test reports to the GSA inspector. At trial, petitioner unsuccessfully urged the district court to instruct the jury that it had to determine whether petitioner's allegedly false statements were material. Instead, the trial judge held that petitioner's statements were material as a matter of law. Pet. 5-6.

2. On appeal after conviction, petitioner argued that the materiality of his allegedly false statements should have been determined by the jury. The court of appeals rejected that contention, holding that materiality was a question of law. Pet. App. 8a. The court separately observed (*id.* at 8a n.2) that, although some courts had held that materiality is not an element of an offense under 18 U.S.C. (& Supp. IV) 287, it would not decide that question because, even if those courts were wrong, materiality would be a question for the court under 18 U.S.C. (& Supp. IV) 287, as under 18 U.S.C. 1001.[2]

ARGUMENT

1. Petitioner first contends (Pet. 7-10) that the question of materiality under 18 U.S.C. (& Supp. IV) 287 and 1001 is a factual question for the jury, not a legal question for the court. The court below correctly rejected that contention.

The great majority of the courts of appeals have held that materiality under Section 1001 is a question of law

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[2] The court also rejected petitioner's claims that venue was not proper in the Eastern District of Virginia, that the trial court improperly instructed the jury on the knowledge required for conviction, that the prosecutor improperly vouched for a government witness and withheld exculpatory information, and that there was insufficient evidence to sustain his conviction (Pet. App. 5a-9a). Petitioner does not renew any of those contentions in this Court.

for the court rather than one of fact for the jury, and this Court has repeatedly declined to review those decisions. See, *e.g.*, *United States* v. *Holley*, 826 F.2d 331, 335 (5th Cir. 1987), cert. denied, No. 87-982 (Mar. 21, 1988); *United States* v. *Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States* v. *Keefer*, 799 F.2d 1115, 1126 (6th Cir. 1986); *United States* v. *Greenwood*, 796 F.2d 49, 55 (4th Cir. 1986); *United States* v. *Brantley*, 786 F.2d 1322, 1327 (7th Cir.), cert. denied, 477 U.S. 908 (1986); *United States* v. *Hansen*, 772 F.2d 940, 950 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986); *United States* v. *Greber*, 760 F.2d 68, 72-73 (3d Cir.), cert. denied, 474 U.S. 988 (1985); *Nilson Van & Storage Co.* v. *Marsh*, 755 F.2d 362, 367 (4th Cir.), cert. denied, 474 U.S. 818 (1985); *United States* v. *Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.), cert. denied, 469 U.S. 828 (1984); *United States* v. *Abadi*, 706 F.2d 178, 180 (6th Cir.), cert. denied, 464 U.S. 821 (1983); *United States* v. *Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983); *United States* v. *McIntosh*, 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982); *United States* v. *Adler*, 623 F.2d 1287, 1292 (8th Cir. 1980); *United States* v. *Bernard*, 384 F.2d 915, 916 (2d Cir. 1967).[3]

With respect to Section 287, all of the courts of appeals that have addressed the issue of materiality have held that it is a question of law or that materiality is not an element of a Section 287 violation at all. *United States* v. *Elkin*, 731 F.2d 1005, 1009-1010 (2d Cir.), cert. denied, 469 U.S. 822 (1984); *United States* v. *Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Adler*, 623 F.2d at 1291 n.5, 1292; *United States* v. *Haynie*, 568 F.2d 1091, 1092 (5th Cir. 1978). See

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[3] The Court denied a petition for a writ of certiorari raising this issue only last month. *Gibson* v. *United States*, cert. denied, No. 87-6426 (May 16, 1988).

also 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 28.09 (3d ed. 1977 & Supp. 1987).

This array of authority treating materiality as an issue of law accords with this Court's recognition in *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929), that the materiality of false statements generally is a question for the court. That understanding was recently reaffirmed in *Kungys* v. *United States*, No. 86-228 (May 2, 1988). The Court there held (slip op. 10) that the issue of materiality under 8 U.S.C. 1451 is a legal question. In so holding, the Court quoted with approval the Sixth Circuit's *Abadi* decision holding materiality to be a legal question under 18 U.S.C. 1001.

As petitioner points out (Pet. 8), the Ninth and Tenth Circuits have in several decisions taken a different position on materiality under 18 U.S.C. 1001. See *United States* v. *Irwin*, 654 F.2d at 677 n.8; *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979).[4] Those decisions, however, do not create a conflict warranting this Court's review. First, neither circuit has addressed the question since this Court's decision in *Kungys*, and both courts have declined to extend the rulings on Section 1001 to other statutes involving the issue of materiality.[5] Accordingly, both cir-

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[4] Petitioner points to no conflict on whether materiality under 18 U.S.C. (& Supp. IV) 287 is a question of law. Indeed, as noted above, the Tenth Circuit in *Irwin* held materiality under that provision to be a question of law, even though it held materiality under Section 1001 to be a factual question for the jury.

[5] Thus, in several recent decisions applying statutes other than 18 U.S.C. 1001, the Ninth Circuit has held that materiality is an issue of law to be decided by the court. See *United States* v. *Martinez*, 837 F.2d 900, 902 (1988); *United States* v. *Larm*, 824 F.2d 780, 783-784 (1987), cert. denied, No. 87-907 (Feb. 22, 1988); *United States* v. *Flake*, 746 F.2d 535, 537 (1984), cert. denied, 469 U.S. 1225 (1985); *United States* v. *Prantil*, 764 F.2d 548, 557 (1985). And the Tenth Cir-

cuits can be expected to reconsider the matter in light of this Court's recent decision in *Kungys*. Moreover, to our knowledge, neither circuit has actually overturned a conviction under Section 1001 on the ground that the issue was not submitted to the jury. The Ninth Circuit has twice held that a trial court erred in not submitting the issue to the jury, but in both cases the court affirmed the convictions because it was clear that the statements at issue were material. *United States* v. *Valdez*, 594 F.2d at 728-729; *United States* v. *East*, 416 F.2d 351, 354-355 (1969). The Tenth Circuit has approved the practice of submitting the issue of materiality to the jury, but it has not considered whether it is reversible error for a trial court to decide the issue itself. See *United States* v. *Irwin*, 654 F.2d at 677 n.8 and cases cited therein.[6]

In any event, the statements and claims in this case were material beyond any doubt. The false test reports were submitted to the GSA inspector, whose approval was part of the FSSC contracting process (Pet. App. 3a), and the false claim for payment for the Sperry multimeter was submitted under a contract requiring provision of a Fluke

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cuit has recently held that materiality in a perjury case is a question for the court. *United States* v. *Larranaga*, 787 F.2d 489, 494 & n.1 (1986). The court there acknowledged that materiality is properly treated as an issue of law under 26 U.S.C. 7206(1), which covers the filing of false tax returns, and stated: "[w]e need not determine today whether we should continue to treat § 1001 in [a contrary] fashion" (787 F.2d at 494 n.1).

[6] Of course, if, as the Second Circuit has concluded with respect to Section 1001 as well as Section 287 (*United States* v. *Elkin*, 731 F.2d 1005, 1009, cert. denied, 469 U.S. 822 (1984)), and as the Tenth and Fifth Circuits have concluded with respect to Section 287 (*United States* v. *Irwin, supra*; *United States* v. *Haynie, supra*), materiality is not an element of the offense at all, any variation among the circuits on the materiality issue is entirely academic, since there is no need for the issue of materiality to be addressed by either the court or the jury.

multimeter or its equivalent. Because they were "designed * * * to induce payment," the false claims and statements in this case "undoubtedly were material" (*United States* v. *Larm*, 824 F.2d at 784). Accordingly, any error in the district court's deciding the issue of materiality itself was harmless.

2. Petitioner also contends (Pet. 10-13) that materiality is an element of both 18 U.S.C. (& Supp. IV) 287 and 18 U.S.C. 1001. That contention raises a question not presented by this case, because the court of appeals did not rule contrary to petitioner's position. The court did not even question whether materiality is an element of an offense under 18 U.S.C. 1001, and it expressly declined to decide the question under 18 U.S.C. (& Supp. IV) 287. Instead, the court assumed, in agreement with petitioner, that materiality is an element of an offense under that statute. Pet. App. 8a n.2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney

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